

CHAPTER 7

RELEASE OF TECHNICAL DATA TO THE PUBLICA. GENERAL

Public disclosure of technical data, as defined by 10 U. S.C. 130 (reference (e)) , that has military or space application is tantamount to providing uncontrolled foreign access. Because it is in the national interest to control the release of such data, Congress granted DoD the authority, by 10 U. S .C. 130 (reference (e)) , to withhold that data when certain criteria are met. DoD Directive 5230.25 (reference (o)) contains the policy and procedures for determining whether to disseminate or withhold technical data with military or space application.

B. REQUIREMENTS FOR WITHHOLDING OF TECHNICAL DATA

1. Unclassified technical data may be withheld from the public when the data meets the following criteria:

a. The data has military or space application and is in the possession of or under the control of the Department of Defense.

b. The data is entitled to protection pursuant to DFARS Subpart 227.402-72(b) (reference (b)) for contractor sensitive or proprietary information.

c. The data is not subject to an exception under the export control laws.

d. The data discloses critical technology or operational advantage, as determined by the controlling DoD office..

2. In all cases the controlling DoD office, i.e., the activity that sponsored the work that generated the technical data, or received the technical data for the Department of Defense has the responsibility for determining whether the criteria for withholding from public disclosure are met.

3. Repository personnel, or other designated receiving activities, shall review incoming technical data to ensure that data created under a contract whose solicitation was issued after November 6, 1984, has been assigned a distribution statement in accordance with MIL-STD-1806 (reference (n)). Incoming technical data created after that time which have not been assigned a proper distribution statement shall be returned to the controlling DoD office for assignment of a proper distribution statement. In cases where personnel reviewing the incoming technical data suspect that proper analysis was not conducted to support assignment of a valid distribution statement, these personnel, with the concurrence of legal counsel, should seek written confirmation that the policies and procedures of DoD Directive 5230.24 (reference (c)) were followed in assignment of distribution statements. Subsequent delivery of this data still bearing apparent inappropriate distribution statements should be referred to the Under Secretary of Defense for Policy, who is responsible for administering and monitoring compliance with the program.

4. Unmarked technical data which is already held in the files by the repository shall not be removed from the file and returned to the controlling office for the sole purpose of marking. However, when a request is received for this technical data, the controlling DoD office should then be required to determine and provide appropriate marking directions to the repositories or designated receiving activities before the copy is released. In those cases where it is impossible to determine who the controlling DoD office is, - the repository or designated receiving activity will assume responsibility for marking the technical data.

C. FREEDOM OF INFORMATION ACT (FOIA) DENIAL AUTHORITY

1. DoD Directive 5230.25 (reference (o)) also provides the Department of Defense the authority to deny FOIA (reference (ah) requests for data that meet the criteria described in Section B above. Assignment of a restrictive distribution statement (i.e., other than distribution statement A) may be evidence that those criteria have been met. In such cases, the third or fourth exemption of the FOIA should be cited, as appropriate. It should be noted that to meet exemption 3 withholding criteria by applying the statutes of 10 U.S.C. 130 requires written supporting documentation that meets the rationale of, or is listed, in the Munitions List (ML) or Militarily Critical Technologies List (MCTL).

D. CERTIFICATION PROGRAM FOR QUALIFIED REQUESTERS

1. Central to the technical data release control mechanism is the concept of a large pool of "Qualified U.S. and Canadian Contractors". This pool also includes private individuals and state and local governments that have a valid need for specific data. The management of this pool of qualified requesters is a responsibility of the U.S./Canadian Joint Certification Office (JCO) and the Defense Logistics Services Center (DLSC), a primary field activity of the Defense Logistics Agency.

2. The JCO has established a Qualified U.S./Canadian Contractor File to implement management control of the certification of qualified requesters and to provide this information to activities making determinations on the release of technical data with military or space application. This file has been implemented as a computer data base that will be used to generate a "Certified U.S./Canadian Contractor Access List (CCAL) ." The CCAL is published quarterly and is available on microfiche. Non-Government subscribers may obtain the CCAL through the Superintendent of Documents.

3. Requests for certification must be submitted on the DD Form 2345, "Militarily Critical Technical Data Agreement." The individual or organization seeking certification should submit the form directly to the following:

U.S./Canadian Joint Certification Office
Defense Logistics Services Center
ATTN : DLSC-FBA, Federal Center
Battle Creek, MI 49017-3084

4. In submitting a DD Form 2345, the individual or organization shall certify that:

a. The person who will receive export-controlled technical data is a U.S. or Canadian citizen.

b. The technical data will be used in connection with a legitimate business that is described in the certification. This does not necessarily require a contract or grant from the U.S. or Canadian Governments.

c. The responsibilities under export control laws are understood and will be observed. This includes a recognition that release or disclosure of technical data within the U.S. or Canada with the knowledge or intent that it will be transmitted to a foreign country is illegal.

d. The business will not release or disclose the data to other than its employees except as allowed by DoD Directive 5230.25 (reference (s)) or, for Canada, the "Technical Data Control Regulations (TDCR)."

e. No person who will have access to the technical data is debarred or has violated export control laws.

f. The contractor itself is not debarred or has not violated export control laws.

5. The JCO will cross reference other available data to determine to the greatest extent possible whether the technical data recipient has been debarred, suspended, charged with violating export-control laws and regulations, or involved with violations of other Militarily Critical Technical Data Agreements. The JCO will also look for activities and organizations clearly unrelated to legitimate business purposes as defined in reference (s). Examples of inappropriate business activity are submittals by a foreign embassy or foreign trade organizations or activities that, by their nature, are primarily designed to permit public dissemination (lectures and publications, etc.).

6. When the DD Form 2345 has been approved by the JCO, information will be selected from the form and entered in the Qualified U.S./Canadian Contractor File. Selected data will subsequently be extracted from the file and will appear in the CCAL. Entries in the file will be recertified every 5 years.

E. DOCUMENTATION REQUIRED FOR DISTRIBUTION REVIEW

1. The technical data repository should have the Cataloging Handbook H-4/H-8 Series (reference (ai)) available for ready reference. This microfiche publication is available from the Defense Logistics Services Center at the address shown above in section D.3.

2. Technical organizations that are providing technical support to the engineering data repository or other designated engineering data release organization will need routine access to the Militarily Critical Technologies List (MCTL) as well as access to the CCAL. Requests for the MCTL should be submitted to the technology transfer focal points in the Military Services and the Defense Agencies. Technical review activities may also require access to or information on the State Department's Munitions List and the Department of Commerce's Commodities Control List.

3. Controlling offices will need the CCAL, MCTL, and access to, or information on, the Munitions List and the Commodities Control List.

F. PROCEDURES FOR DISTRIBUTION REVIEW AND RELEASE OF TECHNICAL DATA

1. Initial Repository Actions On Receipt of Request for Technical Data

a. Determine if the technical data requested is not releasable or has restrictions on release or disclosure for other reasons. These reasons include security classification or valid marking with a limited rights legend. Where it is possible to expunge the specific data to which the restrictions on release or disclosure apply, the request, along with the relevant technical data and supporting evaluation, should be referred to a designated organizational element at the local acquisition activity. The designated organization element should coordinate his actions with the local Data Management Office and any other technical activity(s) necessary to determine the cost effectiveness of "sanitizing" the document.

b. If the technical data is not subject to other restrictions, it should be reviewed for an "Export-Control Warning Notice." This warning notice should read:

"WARNING - This document contains technical data whose export is restricted by the Arms Export Control Act (Title 22, U.S.C., Section 2751, et seq.) or the Export Administration Act of 1979, as amended, Title 50, U.S.C., App 2401 et seq. Violations of these export laws are subject to severe criminal penalties. Disseminate in accordance with provisions of DoD Directive 5230.25." This warning notice generally will be associated with distribution statements B, C, D, E, F, or X. If no distribution statement is annotated on the document or if distribution statement A has been applied, the controlling

DoD office should be contacted to clarify the discrepancy before further review.

2. Distribution Review of Export-Controlled Technical Data

a. If an "Export-Control Warning Notice" is annotated on the technical data, the repository should verify that the requestor is listed on the CCAL. If the requestor is not listed on the CCAL and is not listed on the monthly cumulative "CCAL Change Bulletin" (called the "Disqualified U.S. Contractor Bulletin"), the reviewing activity should deny the request, but provide a blank DD Form 2345, the address for submission to DLSC, and a copy of DoD 5230.25-PH ("reference (aj)), which is a pamphlet that explains DoD's policy for the control of unclassified technical data with military or space application.

b. If the requestor is listed on the CCAL, the request and the requested technical data should be reviewed to determine whether the data requested is related to a legitimate business purpose for which the contractor is certified. If there is any question about the relevancy of the data request to the purpose for which the data was requested, the technical review activity should forward the technical data and the request to the controlling DoD office, concurrently advising the requestor in writing that the request has been forwarded to the controlling DoD office, who will be responsible for the decision to release or deny the request.

3. Distribution Review for Technical Data Assigned a Distribution Statement

a.. If distribution statement A is assigned, release the technical data to the requestor charging an appropriate search; reproduction, and delivery charge in accordance with DoD Instruction 7230.7 (reference (ak)).

b. If distribution statement B is assigned, the technical data is not to be released outside the Government without specific approval of the controlling DoD office. If there is a question whether the requesting activity is indeed a U.S. Government Agency, refer the request and the technical data to the Office of the Under Secretary of Defense for Policy for disposition.

c. If distribution statement C is assigned to the technical data, the data may be released to another party subject to the following conditions.

(1) Either they are a Government contractor or approved by the acquisition as a potential contractor.

(2) If the data is export controlled, a DD Form 2345 must be in the possession of the Department of Defense.

(3) If the data is classified, an approved DD Form 250 (with "need to know" the subject field of the data) must be on file with the Department of Defense.

c. If distribution statement D is assigned to the technical data, the data may be released to another party subject to the following conditions.

(1) Either they are a DoD contractor or " approved by the acquisition activity as a potential contractor.

(2) If the data is export controlled, a DD Form 2345 must be in the possession of the Department of Defense.

(3) If the data is classified, an approved DD Form 250 (with "need to know" the subject field of the data) must be on file with the Department of Defense.

e. If distribution statement E has been assigned to the technical data, the reviewing activity is to release this data to DoD Components only unless specifically approved by the controlling DoD office.

f. If distribution statement F has been assigned to the technical data, the reviewing activity should refer all requests to the controlling DoD office. Each activity should periodically review technical data marked with a distribution statement F to verify that there is a valid and continuing need to store the information. When the need can no longer be established, disposition of the technical data shall be accomplished based on written instructions from the controlling DoD office.

g. If Distribution Statement X has been assigned to the technical data, the data may be released to U.S. government agencies. When a DD Form 2345 is on file with the Department of Defense, the data may also be released to parties with a legitimate business interest with the Department of Defense.

h. The controlling DoD office may always release data to anyone regardless of the distribution statement subject to any constraints imposed by statute or DoD policy.

4. Technical Data Not Marked with a Distribution Statement

a. Technical data that have not been marked in accordance with DoD Directive 5230.24 (reference (c)) should be reviewed by the controlling DoD office and an appropriate distribution statement assigned.

b. An initial step in establishing the appropriate distribution statement is to review whether the technical data has been released to the public. Evidence of such

release would include listing in a reprourement data package or in a procurement description that has been used in the past to support a competitive procurement. Each reviewing activity should canvass the record-keeping at the data repository or at each activity that directs the data repository to release information. Determine whether the appropriate reason for a protective statement such as export controlled or classified still applies and mark the document accordingly.

c. The reviewing activity should also research the Military Engineering Data Asset Locator System (MEDALS) for other repositories that may contain the same, or earlier revisions of the same, technical data. If such duplication exists, proper distribution statement assignment should be the responsibility of the cognizant Government design activity with notification to the other repositories also holding the data.

d. If research indicates that the controlling DoD office no longer exists, the DoD Component Headquarters shall assign responsibility to an appropriate organization in their chain of command to make a determination concerning marking, remarking, and release of the data.